

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

APPLE INC,

Plaintiff,

v.

MASIMO CORPORATION and SOUND
UNITED, LLC,

Defendants.

Civil Action No. 22-1377 (MN) (JLH)

APPLE INC,

Plaintiff,

v.

MASIMO CORPORATION and SOUND
UNITED, LLC,

Defendants.

Civil Action No. 22-1378 (MN) (JLH)

LETTER TO THE HONORABLE JENNIFER L. HALL FROM JOHN C. PHILLIPS, JR.

Dated: July 12, 2023

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Attorneys for Defendants

Dear Judge Hall:

Pursuant to the Court's Order of July 7, 2023 (D.I. 159, C.A. No. 22-1377; D.I. 160, C.A. No. 22-1378) and the Court's Order at the July 7, 2023 Discovery Dispute Conference (Jul. 7, 2023 Discovery Dispute Conf. Tr., D.I. 160, C.A. No. 22-1378 ("Hr'g Tr."), at 21), Masimo submits its letter brief addressing (1) Masimo's objection to Apple's proposed disclosure of Masimo's Protected Material to Pedro Irazoqui, Ph.D., pursuant to Paragraph 12 of the Protective Order; and (2) outstanding items from the July 7, 2023 Discovery Dispute Conference.

Masimo's Objection to Apple's Proposed Disclosure to Dr. Irazoqui

One of Masimo's core technologies is used for real-time, non-invasive monitoring of physiological measurements such as total hemoglobin, carboxyhemoglobin, methemoglobin, oxygen content, oxygen saturation, pulse rate, perfusion index, and pleth variability index. Ex. 1. Masimo has also developed technologies for non-invasively monitoring brain function, including monitoring parameters such as electroencephalogram (EEG) and Multitaper Density Spectral Array (DSA). Ex. 2 (SedLine[®] products); *see also* Ex. 3 (doctor explaining SedLine[®] allows for detecting "warning signs such as asymmetries or seizures"). Masimo has produced thousands of pages of highly confidential information on its non-invasive monitoring technologies. These productions include CAD drawings, schematics, engineering specifications, source code, and emails. Masimo plans to produce many more documents and materials.

The Protective Order in this case requires that, prior to disclosing a producing party's Protected Materials to an expert, the receiving party must identify the person to the producing party, including providing an up-to-date CV. D.I. 127 at ¶12(a), C.A. No. 22-1377. The receiving party must also "provide such other information regarding the [proposed expert's or consultant's] professional activities reasonably requested by the Producing Party for it to evaluate whether good cause exists to object to the disclosure of Protected Material to the outside expert or consultant." *Id.* at 12(a). The producing party has ten days to object to the disclosure of its Protected Materials. *Id.* at ¶12(b).

On June 21, 2023, Apple disclosed its intent to disclose Masimo's Protected Materials to Pedro Irazoqui, Ph.D. Ex. 4 at 8-9. In his CV, Dr. Irazoqui states that he is Scientific Advisor at a medical device company called Neurava, and that he is "advising current Ph.D. students as they commercialize our electroceutical therapy for epilepsy and SUDEP." Ex. 5 at 3. According to Neurava's website, Neurava is commercializing a wearable solution for epilepsy and SUDEP. Ex. 6. Neurava's wearable device records "key biological signals related to epilepsy and SUDEP." *Id.* Neurava's website does not identify which biological signals its commercial wearable products monitor or what methods they use to monitor such biological signals. *See id.* Neurava's website also lists Dr. Irazoqui as Scientific Advisor. Ex. 7.

Masimo asked Apple to describe Dr. Irazoqui's current and planned work and research on technology, for commercial use, of non-invasive physiological measurements. Ex. 4 at 5, 8; Ex. 8. Masimo also asked Apple to identify which biological signals Neurava's commercial wearable devices monitor and which biological signals for monitoring by wearable devices Neurava is developing. Ex. 4 at 5, 8; Ex. 8.

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Apple did not provide the requested information. Instead, Apple told Masimo that Dr. Irazoqui has not and does not work for Neurava, and that Apple need not provide any additional information. Ex. 4 at 1. Apple also suggested that Dr. Irazoqui has no information about Neurava's products and research. Ex. 4 at 1. Apple's stance is belied by Dr. Irazoqui's position as Scientific Advisor to Neurava, his own description of advising on the development of Neurava's commercial products, and other descriptions of his connections to Neurava's products. Ex. 5 at 3; Ex. 7 at 1; Ex. 9 ("Neurava was co-founded by Jay Shah and Vivek Ganesh, graduate students in the lab of Pedro Irazoqui").

Masimo's request for additional information was therefore reasonable and limited to understanding Dr. Irazoqui's current and planned commercial work relating to Masimo's technologies. If Dr. Irazoqui is involved in commercial research or development in areas overlapping with Masimo's technologies, the risk of inadvertent or improper use and disclosure of Masimo's confidential and valuable information is increased. *See, e.g., Monolithic Power Sys., Inc. v. Intersil Corp.*, 2018 WL 6113465, at *1-2 (D. Del. Nov. 19, 2018) (granting protective order preventing proposed expert from viewing confidential information because he currently consults with and previously consulted with competitors).

Accordingly, Masimo repeats its request for Apple to (1) describe Dr. Irazoqui's current and planned work or research on technology, for commercial use, of non-invasive physiological measurements; and (2) identify which biological signals Neurava's commercial wearable devices monitor and which biological signals for monitoring by wearable devices Neurava is developing. Moreover, Masimo requests that Apple explain why Dr. Irazoqui identifies himself as Scientific Advisor at Neurava and why he is identified as Scientific Advisor on Neurava's website if, as Apple asserts, Dr. Irazoqui has not and does not work at Neurava.

Without this information, Masimo objects to Apple's proposed disclosure of its Protected Materials to Dr. Irazoqui. Apple will not be prejudiced by precluding Dr. Irazoqui because it has other technical experts available, including experts it has used in the parties' other litigation. Ex. 4 at 9 (disclosing Dr. Steve Warren and Dr. Majid Sarrafzadeh). Thus, absent the above information, Masimo requests the Court issue an order preventing Apple's proposed disclosure to Dr. Irazoqui.

Outstanding Items From July 7, 2023 Discovery Dispute Conference

Identification of Which Apple Products Are Covered By Each Asserted Claim ("Issue #1"). Although the Court denied Masimo's request for claim charts to explain Apple's contention regarding covered products, Masimo maintained that Apple's contention interrogatory response ("Apple Watch Series 4 devices, Series 5 devices, Series 6 devices, Series 7 devices, Series 8 devices, and Ultra devices may incorporate one or more aspects of the inventions described in one or more of the Asserted Patents in Case No. 22-1378") is deficient. Hr'g Tr. at 14, 21. Apple subsequently agreed to supplement its response to Masimo's Interrogatory No. 4, but does not agree to identify which products it contends are covered by each asserted claim. Providing its contention regarding covered products and claims is not burdensome, and such contentions are proportional in view of Masimo's need to prepare to depose Apple's engineers regarding the

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functionality and performance of the allegedly covered products. The Court should compel Apple to identify which products it contends are covered by each asserted claim.

Radar System (“Issue #6”). Regarding Apple’s obligation to search and collect documents from its Radar system, the Court ordered the parties to confer about the meaning of searching by custodian. Hr’g Tr. at 36-37. The parties conferred but were unable to come to an agreement. Masimo submits that a “custodian” for purposes of Apple’s obligation to search its Radar system includes individuals who initiated, were assigned to, edited, or annotated a Radar. This interpretation is reasonable and proportional because it is limited to those individuals who contributed to the substance of a Radar.

Respectfully submitted,

/s/ John C. Phillips, Jr.

John C. Phillips, Jr. (#110)

cc: All counsel of record (via Email & CM/ECF)

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Table of Exhibits

Ex. No.	Description
1	Masimo Website, "Masimo rainbow® Pulse CO-Oximetry", https://www.masimo.com/technology/co-oximetry/rainbow/
2	Masimo Website, "Next Generation SedLine® Brain Function Monitoring", https://www.masimo.com/products/continuous/root/root-sedline/
3	Masimo Press Release, "Masimo Announces FDA Clearance of Pediatric Indication for SedLine® Brain Function Monitoring and the SedLine Pediatric EEG Sensor", Feb. 28, 2022, https://investor.masimo.com/news/news-details/2022/Masimo-Announces-FDA-Clearance-of-Pediatric-Indication-for-SedLine-Brain-Function-Monitoring-and-the-SedLine-Pediatric-EEG-Sensor/default.aspx
4	Email chain culminating in an email from Carson Olsheski, counsel for Apple, to Jared Bunker, counsel for Masimo, July 5, 2023
5	Curriculum Vitae, Dr. Pedro P. Irazoqui
6	Nuerava Website, https://neurava.com/index.html
7	Nuerava Website, "Our Team", https://neurava.com/about.html
8	Letter from Kendall Loebbaka, counsel for Masimo to Olsheski, June 30, 2023
9	Purdue University Press Release, A Wearable Device May Help Prevent Unexpected Death in Epilepsy, Purdue University, May 12, 2020 https://www.purdue.edu/newsroom/releases/2020/Q2/a-wearable-device-may-help-prevent-unexpected-death-in-epilepsy.html